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No. 92-648

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

EDWIN KOTROSITS, *et al.*,
Petitioners,

v.

GATX CORPORATION NON-CONTRIBUTORY PENSION PLAN FOR SALARIED EMPLOYEES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The petition touches on a number of issues, but appears to raise the following principal question:

> Whether the court of appeals properly analyzed the trial record and relevant legal principles in concluding that the respondent Plan did not act under a conflict of interest in denying petitioners' claims for enhanced pension benefits?

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Respondent GATX Corporation Non-Contributory Pension Plan for Salaried Employees (the "Plan") respectfully submits this brief in opposition to the petition for a writ of certiorari in this case.

OPINIONS BELOW

The unanimous opinion of the court of appeals (Pet. App. 3-50) is reported at 970 F.2d 1165 (3d Cir. 1992). The district court's opinion and order (Pet. App. 51-172) are reported at 757 F. Supp. 1434 (E.D. Pa. 1991).[1]

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1992. Petitioners filed their petition for certiorari on October 2, 1992, and it was rejected. Petitioners thereafter refiled their petition on October 13, 1992, and it was accepted. Petitioners have erroneously relied upon 28 U.S.C. § 2101 (setting forth procedural requirements for filing petitions for certiorari) and S. Ct. R. 17 (setting forth procedural requirements for original actions). *See* Pet. 10. Petitioners have not cited 28 U.S.C. § 1254(1), the only possible jurisdictional basis for their petition.

STATEMENT OF THE CASE

Petitioners have omitted or obscured many of the key facts in this case. Mindful of its obligations under S. Ct.

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[1] Due to numerous typographical errors in petitioners' appendix, respondent has cited to the reported versions of these opinions.

R. 15.1, the Plan believes that the facts set forth below help establish why the decision below is unexceptional and does not furnish a basis for certiorari.

Petitioners are Fuller Company employees who claim that they are entitled to enhanced early retirement benefits under the terms of the Plan. On December 31, 1986, GATX Corporation ("GATX") sold the stock of this former second-tier subsidiary to Fuller Company management in a leveraged buyout. Petitioners did not miss any work as a result of the buyout; each returned to the same job on the first business day of the new year. Despite continuing in their jobs after the buyout, petitioners claim that they suffered a "layoff" under GATX's pension plan entitling them to enhanced benefits.

1. The Terms and Financial Condition of the Plan When Petitioners' Claims Arose. Prior to the buyout, pension benefits accrued to petitioners as participants in the Plan, which covered salaried employees of GATX and of various subsidiaries including Fuller Company. (S. 64.)[2] The Plan is a non-contributory, defined benefit plan. (S. 35, SS. 15.) Thus, the employer (for example, Fuller Company) rather than the participant, makes the contribution to the Plan. (SS. 15.)

At the time of the buyout and of the Plan's consideration of petitioners' claims, the Plan was significantly overfunded. It had a surplus of $8.79 million as of January

[2] This case was submitted in the district court on a stipulated record. The record includes the parties' Stipulation of Facts ("S."), Supplemental Stipulation of Facts ("SS."), 89 jointly submitted exhibits, the transcript of the district court's December 16, 1988 hearing on the merits (Joint Appendix ("J.A.") 86-153), and attachments to the parties' supplemental memoranda of law (J.A. 154-261).

1, 1986, the last audit date preceding the sale. 970 F.2d at 1173. By January 1, 1987, the last audit date preceding consideration of the representative plaintiffs' claims, the surplus had grown to $10.2 million. *Id.*

As of December 31, 1986, the Plan document (J.A. 352 *et seq.*) provided for several different types of early retirement for eligible participants. Petitioners Julius Ruggeri and Edwin Kotrosits, because they had 15 years of Fuller Company service credit, were eligible to retire at age 55. (§ 4.4.) Those choosing the "55-15" retirement option receive benefits reduced so as to be the "actuarial equivalent" of benefits they would later have received had they commenced retirement at age 62. (§ 5.3.)

This case turns on another form of early retirement with different eligibility criteria, the Plan's 75/80 point provision. Section 4.5(a) of the Plan permits participants with sufficient age and service credit to apply for enhanced early retirement benefits if they (a) have a "Termination of Employment" (*see* § 2.14) and (b) meet the additional criteria specified by the Plan. In relevant part, Section 4.5 provides early retirement benefits to any employee:

> with at least 15 years of Service Credit who has not attained age 62, who either (i) has attained age 55 and whose age and Service Credit total at least 75, or (ii) whose age and Service Credit total at least 80, and
>
> (a) who has a Termination of Employment due to permanent shutdown of a plant, department or subdivision thereof, or due to layoff or disability.

If a participant qualifies for a 75/80 point pension, his benefits are not actuarially reduced even though he has retired before age 62. (§ 5.2.)

Petitioners nowhere quote Section 4.5(a), but its text is important. Section 4.5(a) requires *more* than simply a termination of employment (*compare* Pet. 31); the participant must meet one of three additional eligibility criteria. These criteria—permanent plant shutdown, layoff, and disability—share a common feature: the participant has actually lost his job. Enhanced benefits ease the blow of lost wages in these instances.

*2. **The Fuller Company Leveraged Buyout.*** On December 31, 1986, GATX sold all of the stock of its second-tier Fuller Company subsidiary to FA Holding Corporation ("FA") through a Stock Purchase Agreement. (S. 68; J.A. 467.) The officers of FA (primarily the top executives of Fuller Company) represented that they would operate Fuller Company as an ongoing concern. (S. 72, 107; SS. 14 & J.A. 747.) At no time did FA advise anyone at GATX that FA contemplated making reductions in force at Fuller Company following the sale. (S. 77; SS. 10.)

The buyout of Fuller Company had no effect on that company's day-to-day operations. While the ownership of its stock changed, the company's facilities remained open for business and continued making and selling the same products that had been made and sold before the sale. (S. 79; SS. 8.)

*3. **Petitioners' Retention of their Jobs Following the Sale.*** The most important fact obscured by the petition is that neither petitioners nor the sub-classes they represent missed a single day of work or a dollar of salary as a result of the Fuller Company sale. Although the Stock Purchase Agreement declared that the sale constituted a "Termination of Employment" under the Plan, that ter-

mination was purely technical.[3] Petitioners remained in the same jobs employed by the same employer, Fuller Company.

Petitioners Julius Ruggeri and Edwin Kotrosits represent a sub-class of Fuller Company employees with sufficient age and seniority to have filed for a "55-15" pension commencing after the date of the Fuller Company sale, December 31, 1986. (S. 13, 23.) By so filing, petitioners locked in certain lifetime medical and life insurance benefits offered, not by the Plan, but by GATX's subsidiary General American Transportation Company ("GATC"). (J.A. 335, 345.)

Prior to 7:00 a.m. on January 2, 1987, both petitioners received a telephone call from Fuller Company "inviting [them] to return to work." (S. 14, 24.) They then returned to the same job, at the same plant and under the same supervisor, that each had left on the previous business day. (S. 14-16, 25-26.) Thus, neither their jobs nor their salaries were interrupted.

Petitioner Marvyn Souders represents a sub-class of Fuller Company employees who lacked sufficient age and service to file for "55-15" early retirement as of December 31, 1986. Prior to the Fuller Company sale, Mr. Souders was told "to report to work on January 5, 1987, and he would be notified at that time regarding his job status." (S. 34.) On January 5th, the first business day after the sale at the Bethlehem Plant, Mr. Souders reported to the same job that he had held prior to the buyout with the

[3] By declaring a "Termination of Employment" (a defined term under the Plan (§ 2.14)), GATX acknowledged that members of the Ruggeri subclass (who applied for 55-15 pensions) could begin receiving benefits immediately after the sale.

same employer (Fuller Company) under the same supervisor.[4] (S. 32.)

4. The Plan's Consideration of Petitioners' Claims. Despite remaining in their jobs, petitioners Souders, Kotrosits, and Ruggeri filed claims for 75/80 point "layoff" benefits in March, 1987. (S. 105 & J.A. 697.) The claims were devoid of detail. (*See id.*) Petitioners simply asserted that, by virtue of the Fuller Company sale, they had met the requirements of Section 4.5(a). (J.A. 540.) Messrs. Ruggeri and Kotrosits also claimed that they were involuntarily terminated (and therefore "laid off") because they could not obtain the GATC insurance benefits if they did not retire by December 31, 1986. (*Id.*)

Petitioners' claims were so lacking in detail or supporting evidence that they failed to acknowledge that they were continuing to work at Fuller Company. Nor did they claim that they had a "temporary suspension of employment," as they now assert. Pet. 31. Petitioners also made no mention of Fuller Company's new pension plan, and thus did not suggest that the new plan was in any way relevant to deciding whether they qualified for 75/80 point benefits under *GATX*'s plan.

Petitioners' claims were received by the Plan Administrator, James Herbert, who denied them in letters dated March 30, 1987. (S. 106 & J.A. 543.) Mr. Herbert's decision was based on his understanding that FA had intended to operate, and was operating, Fuller Company as a continuing concern, and that Messrs. Souders, Rug-

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[4] Petitioners' claim that he was told on January 5th to report on January 6th has no support in the record and is contrary both to Mr. Souders' sworn testimony and the finding of the District Court. 757 F. Supp. at 1444.

geri, and Kotrosits continued to work at Fuller Company. (S. 107.) His understanding came both from Kenneth Krick, GATX Corporation's primary negotiator with FA (S. 84, 89), and from Elmer Gates, Chairman of FA, who told a November 1986 meeting of Fuller employees, "We are going to hit the ground running. We look to continue the operation." (S. 107; *see* SS. 38.)

Mr. Herbert's decision also was based on the Plan's treatment of prior dispositions of businesses covered by the Plan. (S. 108.) The Plan had not previously afforded 75/80 point benefits to employees of businesses sold as going concerns whose employment was uninterrupted by the sale. 970 F.2d at 1174.

On April 30, 1987, petitioners appealed the Plan Administrator's denial of their claims to the Plan Benefits Committee. (S. 111 & J.A. 549.) Prior to the Committee meeting on June 8, 1987, the Committee received extensive materials and a chronology of events prepared by Mr. Herbert. (S. 114 & J.A. 556.) At the June 8th meeting, the Committee voted to uphold the Plan Administrator's decision. (S. 112.) The basis for the Committee's decision, as set forth in written minutes (J.A. 556), included the fact that petitioners continued in their Fuller Company jobs after the buyout and that the Plan's treatment of prior business sales. (S. 113.)

5. Proceedings in the District Court. Plaintiffs filed their Complaint on March 2, 1988. On June 1, 1988, the Court conditionally certified the Souders and Ruggeri subclasses. Following submission of the case on a stipulated record, the court held oral argument on December 16, 1988. At argument, the court's questions focused on whether plaintiffs would be "hurt" by a diminution in future pension benefits resulting from the sale, and referred to the

parties' dispute over the definition of layoff as a mere "word game." The court also was clear that, in its view, the dispositive point should be whether a reduction in post-buyout benefits would, in fact, occur.

> THE COURT: It's a word [i.e. the terms used in § 4.5(a)], again, it's a word. The point I'm making is if your people were hurt I'd play the word game your way. If they're not hurt, why should I? It's just as easy for a judge to say in this fact situation we find that there is no plant closing under the context of this case and the phraseology, therefore no recovery. But if I find your people are hurt, I could easily say yes, it was a plant closing. It's no longer a GATX plant, therefore it has to be a termination or a plant closing, therefore you win. . . . I'm here to exercise my conscience as to what's right.

(J.A. 111.)

> THE COURT: Well, if your people [i.e. plaintiffs] are hurt I'm going to rule in their favor, that's for sure. What you want me to do is rule in their favor even if they're not hurt, and that's harder for me to do.

(J.A. 121.) The court then ordered the parties to submit post-argument briefs on the issue of whether petitioners had been "hurt."

In addition to discussing the impact of this Court's intervening decision in *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989), the parties submitted briefs and accompanying actuarial calculations on the effect the Fuller Company sale had on the economic position of the petitioners. Using an analysis prepared by the Plan's regular consulting actuary, the Plan submitted evidence demonstrating that petitioners' *total* economic expectations had changed minimally as a result of the sale. *See* 970 F.2d at 1174-75 (describing parties' submissions).

The Plan addressed a final economic issue: whether plaintiffs would enjoy a windfall if they received 75/80 point enhanced benefits while continuing to work and earn credit towards a second Fuller Company plan pension. The Plan submitted an analysis showing that, under that scenario, the Ruggeri and Souders sub-classes would, respectively, enjoy pensions **22%** and **60%** higher than if the Fuller Company sale had never occurred. (J.A. 207.)

6. The District Court's Decision. Eighteen months after completion of the supplemental briefing, the court issued an opinion ordering the Plan to pay both sub-classes 75-80 point benefits because the Plan's decision was incorrect. Although the court found that the Plan's decision was "arguably reasonable," 757 F. Supp. at 1461, and entitled to deference under the terms of the Plan, *id.* at 1453, it ruled that such deference should be strictly limited because, "under the special circumstances of this case," the Plan operated under a conflict of interest. *Id.* at 1458, 1461.

In finding a conflict of interest, the court did not discuss the Plan's $10,000,000 funding surplus or the caselaw (cited *infra*) suggesting that a substantial surplus negates a conflict of interest. It also found "bad faith" based on the conduct of GATX, the plan sponsor. The court also somehow found probative of a conflict of interest how the Plan interpreted prior business sales and its supposed reliance on the post-buyout Fuller Company pension plan.[5] *Id.* at 1461.

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[5] Even were there a logical relationship between such consideration and whether the Plan had a conflict of interest, the Plan never claimed to have considered the new Fuller Company plan since petitioners had not submitted that plan as part of their claims.

Having found a conflict of interest, the trial judge then rejected the Plan's decision that plaintiffs had not been laid off on the ground that they had suffered a "temporary suspension of employment." *Id.* at 1459. Finally, the court held that the Plan's decision could not be justified, given the conflict of interest, because GATX had sacrificed plaintiffs' interests in negotiating the Fuller Company sale by not securing a guarantee that plaintiffs' pension accruals would remain the same following the sale. *Id.* at 1461. The court's conclusion treats this omission as the crucial fact in the case:

> In sum, this court concludes that parties to a corporate sale of stock or assets must fully safeguard the pension rights of the corporate employees in the selling documentation. If, as in this case, the structure of the sale results in a portion of the transaction costs being shifted to the employees of the entity being sold, courts should scrutinize the corporate sale closely. Because ERISA imposes obligations on plan fiduciaries and sponsors that cannot be evaded by subterfuge, federal courts will not countenance tactics such as those employed by GATX in conjunction with the Fuller sale. Therefore, this court will order the Plan to award 75/80 point pensions.

Id. (emphasis added). The court ignored the decided caselaw on this point, which holds that selling companies have no obligations under ERISA to ensure that *future* benefit accruals are not diminished by the sale.[6]

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[6] *See Dougherty* v. *Chrysler Motors Corp.*, 840 F.2d 2, 3 (6th Cir. 1988); *Phillips* v. *Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987). *Accord Aubrey* v. *Pennzoil Co.*, 961 F.2d 928, 932 (10th Cir. 1992).

*7. **The Court of Appeals' Decision.*** On July 6, 1992, a unanimous panel of the Third Circuit reversed the district court and upheld the decision of the Plan Benefits Committee that petitioners were not entitled to enhanced benefits. The court rejected the district court's finding that the Plan acted under a conflict of interest and upheld the Plan's construction of "layoff" as reasonable under a deferential standard of review.

The Third Circuit's conclusion that the Plan did not act from a conflict of interest rested on a careful evaluation of the legal significance of the evidence tendered to the district court. The court of appeals observed that the Plan's assets "far exceeded the benefits accrued to date" and recognized the absence of a finding by the district court on the impact of this surplus. 970 F.2d at 1173. The court of appeals also noted both the lack of evidence to support findings of bad faith and that, in any event, the bad faith was irrelevant to the legal determination whether the Benefits Committee acted under a conflict of interest. *Id.* at 1174. The court of appeals concluded further that the Benefits Committee's "reasonable" analysis of prior business sales did not bear on the existence of a conflict of interest. *Id.* The court rejected as legally irrelevant the district court's concern that GATX had not guaranteed the pension levels provided by the new Fuller Company ownership. *Id.* at 1175.

The court of appeals also had no difficulty in holding the Benefits Committee's interpretation to be reasonable. In so holding, the court noted some of the numerous ERISA cases upholding plan decisions not to provide enhanced pensions or severance to employees who retain their jobs with a new owner following a sale of business. *Id.* at 1176-77 (citing cases).

REASONS FOR DENYING THE WRIT

Although their petition mentions several issues in passing, petitioners have not presented a single credible ground for certiorari.

They have not shown a conflict among the circuits. They do not assert that there is a direct conflict between the decision below and *Brown* v. *Blue Cross & Blue Shield of Alabama, Inc.*, 898 F.2d 1556 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 712 (1991). They instead claim that the decision below "effectively circumvent[s]" or "do[es] an end run on" *Brown*. Pet. 2, 41. The simple truth is that petitioners cite *Brown* for a different issue than the issue decided below. Petitioners cite *Brown* solely for its discussion of how to treat a conflict of interest *once a conflict is found*. The decision below instead addresses a different issue: *whether* a conflict existed at all where, as here, the Plan had a significant surplus.

Petitioners also suggest that the court of appeals failed to give proper deference to the "findings" of the district court—hardly a certworthy issue. Petitioners do not even identify, much less address, the court of appeals' unexceptional proposition that the district court's evaluation of the legal significance of the facts is itself "a legal question subject to plenary review." 970 F.2d at 1172 n.5. Nor do petitioners acknowledge the court of appeals' reliance on the decisions of four other circuits recognizing, as a matter of law, that fully-funded Plans do not operate under a conflict of interest.

Finally, petitioners seem to suggest that there is a conflict among the circuits in deciding whether employees who remain in their jobs following a business sale have suffered a layoff. Petitioners (like the district court) cite earlier labor law decisions involving entirely different facts

and ignore the consistent line of *ERISA* decisions holding that such business sales do not constitute layoffs absent explicit plan language to the contrary.

I. THE DECISION BELOW DOES NOT CONFLICT WITH THE ELEVENTH CIRCUIT'S DECISION IN *BROWN*.

Faced with a petitioner's claim that there is a conflict among the circuits, this Court has granted review only when confronted with "a real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized." R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 4.3, at 196 (6th ed. 1986) (footnote omitted). There is no reason for review when the supposedly conflicting decisions do not decide the same issue.

Here, petitioners do not argue that there is a direct conflict of any kind between the decision below and *Brown* v. *Blue Cross & Blue Shield of Alabama, Inc.*, 898 F.2d 1556 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 712 (1991). Nor could they. The decision below rests in pertinent part on the court's determination that respondent, a fully-funded plan, did not act under a conflict of interest in denying petitioners' claims. In *Brown*, the Eleventh Circuit held that the defendant insurer acted under a conflict of interest in paying benefits precisely because it was *not* a trust.

> Because an insurance company pays out to beneficiaries from its own assets rather than the assets of a trust, its fiduciary role lies in perpetual conflict with its profit-making role as a business. . . . The inherent conflict between the fiduciary role and the profit-making objective of an insurance company makes a highly deferential standard of review inappropriate.

898 F.2d at 1561-62.

The Eleventh Circuit therefore had no occasion to consider under what circumstances fiduciaries who are not insurers operate under a conflict of interest. The contrast could not be greater than between an insurer paying from its own assets and a fully-funded plan with a surplus in excess of $10 million. Here, GATX as Plan sponsor faced no direct liability at all.

Petitioners instead rely on *Brown* solely and explicitly for its analysis of the standard of review *assuming* that a conflict of interest exists. *E.g.*, Pet. 35, 43-45. The insurmountable difficulty for petitioners in seeking certiorari is that the Third Circuit never had to consider that analysis because the court held that the respondent Plan did not act under a conflict of interest. The Third Circuit simply did not reach the asserted basis for the conflict with *Brown*. *Brown* therefore has no bearing on this case.

Undaunted, petitioners complain that the Third Circuit sought to "circumvent[ ]" or "do an end run on [sic] *Brown*." Pet. 2, 41. Petitioners are thus reduced to seeking certiorari based on the Third Circuit's *failure* to create a conflict with *Brown* in ruling for respondent. As a basis for certiorari, this borders on the frivolous.

In reality, petitioners' "argument" has nothing to do with *Brown*, but instead rests on their explicit assertion that the Third Circuit had an ulterior motive in holding that the Plan had no conflict of interest. They contend that the Third Circuit (a) wanted petitioners to lose and (b) could cause petitioners to lose only by reversing the district court's decision on the conflict of interest issue.

> The issue before this Court . . . goes to the heart of a District Court's fact-finding responsibilities and an appellate court's ability to disregard those findings to change the outcome of a case to its own liking.

Pet. 27.

> The Third Circuit simply refused to recognize this obvious conflict [of interest]; perhaps that was the only way they could avoid directly test [sic] challenging *Brown*.

Pet. 36.

> It is submitted that the Third Circuit felt compelled to override the District Court's factual finding that there has [sic] conflict of interest because of its critical significance under [*Brown*].

Pet. 41. Petitioners thus ask this Court to sit as a court of error to correct the supposed injustice perpetrated below.

This Court is not a court of error, nor does a groundless attack on the integrity of the Third Circuit furnish a basis for certiorari. The unanimous panel's decision is careful, thorough, and (as discussed in the next section) consistent with the caselaw from other circuits. A petition premised on baseless charges of judicial bias is simply not credible.

II. PETITIONERS HAVE NOT RAISED A SUBSTANTIAL CHALLENGE TO THE THIRD CIRCUIT'S REVIEW OF THE DISTRICT COURT'S DECISION THAT THE PLAN ACTED UNDER A CONFLICT OF INTEREST.

At more or less random intervals, petitioners claim that the Third Circuit improperly failed to give deference to the district court's "findings" regarding the Plan's alleged conflict of interest.[7] Pet. 24, 27, 30, 47-48. Petitioners never frame this supposed issue as a reason to grant certiorari. They show no conflict among the circuits; indeed, four other circuits have also held that plans with substan-

[7] As discussed above, petitioners claim that the Third Circuit disregarded these "findings to change the outcome of [the] case to its own liking." Pet. 27.

tial surpluses do not labor under a conflict of interest. Nor have petitioners cited cases from other circuits showing that the court of appeals' review of district court findings in this area is somehow a matter of concern requiring this Court's attention.

Leaving aside their failure to frame the issue in terms of certiorari, petitioners have not shown that the standard of review is a bona fide issue in this case. Petitioners never quote or describe the Third Circuit's unexceptional analysis of its review of the district court's conflict of interest determination. We do so below.

> [W]hile the district court's factual determinations regarding the circumstances under which the [Benefits] Committee's decision was made are entitled to a presumption of correctness, the court's decision that these circumstances warrant a reduced level of deference is a legal question subject to plenary review. In order to determine the proper level of deference due the committee's decision, we must therefore undertake an independent evaluation of the significance of the alleged bias.

970 F.2d at 1172 n.5 (citation omitted).

The standard of review is, of course, a question of law. Moreover, the Third Circuit is surely correct in holding that the legal significance of the facts is subject to the court of appeals's plenary review of legal questions. As the Second Circuit has noted, even in making factual determinations:

> a decision-maker might rely on legally impermissible factors, fail to give consideration to legally relevant factors, apply incorrect legal standards, or misapply correct legal standards. . . . [The court of appeals should] accord plenary review to any aspect of a trial court's decision that can fairly be isolated as determining an issue of law.

ASCAP v. *Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 569 (2d Cir. 1990) (Newman, J.). *Cf. FDIC* v. *Oaklawn Apartments*, 959 F.2d 170, 173 (10th Cir. 1992) (application of law to facts subject to plenary review).

Unsurprisingly, the grounds urged by petitioners for reversal of the court of appeals rest on a series of legal principles that have been rejected, directly or indirectly, by other circuits under ERISA. For example, petitioners allege a conflict of interest because the members of the Plan Benefits Committee are GATX officers. Pet. 36-37. The circuits have often rejected the contention that a plan has a presumptive conflict of interest merely because its fiduciaries are also employees of the sponsor (here, GATX).[8]

Petitioners also claim that the potential $2 million cost to the Plan of granting enhanced benefits created a conflict of interest. The court of appeals determined that the Plan had a $10.2 million surplus at the time of the sale and noted the uncontradicted evidence that the Plan could amortize the $2 million cost over 15 years. 970 F.2d at 1173 & n.6.[9] The court then relied on the opinions of four other circuits in holding that the surplus negated any present conflict of interest and created only a "possibility of future indirect consequences" to GATX as sponsor. *Id.* at 1173. *See Woolsey* v. *Marion Laboratories, Inc.*, 934 F.2d 1452, 1459-60 (10th Cir. 1991); *De Nobel* v. *Vitro Corp.*, 885 F.2d 1180, 1191 (4th Cir. 1989); *Lowry* v. *Bankers*

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[8] *See, e.g., Woolsey* v. *Marion Laboratories, Inc.*, 934 F.2d 1452, 1459 (10th Cir. 1991); *De Nobel* v. *Vitro Corp.*, 885 F.2d 1180, 1191 (4th Cir. 1989); *Lowry* v. *Bankers Life & Casualty Retirement Plan*, 871 F.2d 522, 525-26 (5th Cir.), *cert. denied*, 493 U.S. 852 (1989).

[9] The district court made no finding (and, indeed, ignored) the extent of the Plan's surplus.

Life & Casualty Retirement Plan, 871 F.2d 522, 525-26 n.7 (5th Cir.), *cert. denied*, 493 U.S. 852 (1989); *Oster* v. *Barco of California Employees' Retirement Plan*, 869 F.2d 1215, 1217 (9th Cir. 1988).

Petitioners again presume, without citation to authority beyond the district court's decision, that respondent had a conflict of interest because it had no reason to be concerned about the morale of Plan participants who, after the buyout, no longer worked for a GATX-owned business. There is no presumption that Plan fiduciaries are biased, *De Nobel* v. *Vitro Corp.*, 885 F.2d at 1191, and no circuit has ever adopted the legal principle necessarily urged by petitioners: that a fiduciary must establish that he had an incentive to be fair.[10]

Finally, petitioners criticize the Third Circuit for ignoring the cost to GATX (actually GATX's subsidiary GATC) of granting medical and life insurance benefits to members of the Souders sub-class (*i.e.*, those petitioners who were not eligible for early retirement to lock in these benefits). Petitioners fail to disclose that the district court never ruled on this issue, which was raised after the district court made its decision.[11] Yet, assuming *arguendo* that this issue could properly be considered by the court of appeals, the Third Circuit's alternative conclusion that the "record is devoid of any evidence . . . regarding this pro-

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[10] In fact, ERISA's penalties for breach of fiduciary duty (29 U.S.C. § 1109) are reason enough for fiduciaries to adhere strictly to their duties—especially where, as here, the plan has a substantial surplus.

[11] Petitioners also do not disclose their failure to put the insurance plans in evidence in the district court.

gram or the costs associated with it," 970 F.2d at 1175, hardly raises a question for certiorari.[12]

III. THE PLAN'S CONSTRUCTION OF "LAYOFF" IS FULLY CONSISTENT WITH THE *ERISA* CASELAW CONSTRUING THIS TERM.

Petitioners claim almost in passing that the Plan's construction of "layoff", upheld by the Third Circuit as reasonable, is inconsistent with the decisions of other courts. With a dismaying lack of candor, petitioners have cited two irrelevant labor law cases,[13] without discussing *any* of the ERISA cases holding that employees who retain their jobs after the sale of a business have not suffered a layoff.

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[12] Petitioners also claim that the decision below has "implications concerning the application of the arbitrary and capricious standard" even absent a conflict of interest. *See* Pet. 48. "Implications" are insufficient to justify certiorari—and petitioners have certainly not shown a conflict among the circuits or confusion of any kind. While the circuits have properly looked at the circumstances of each case to determine if the defendant abused its discretion, they agree that the principal factors urged by petitioners, the plausibility of the plan's construction of its terms, prior administration of the plan, and evidence of bad faith, are relevant. *See, e.g., Arfsten* v. *Frontier Airlines Retirement Plan*, 967 F.2d 438, 441-42 (10th Cir. 1992); *Guy* v. *Southeastern Iron Workers' Welfare Fund*, 877 F.2d 37, 39 (11th Cir. 1989); *De Nobel* v. *Vitro Corp.*, 885 F.2d at 1187. In reality, petitioners simply disagree with the Third Circuit's evaluation of these factors, but their disagreement hardly shows a need for certiorari.

[13] *See* Pet. 32-33 & n.3 (citing *CBS Inc.* v. *International Photographers of Motion Picture Industries, Local 644*, 603 F.2d 1061, 1062 (2d Cir. 1979) (reviewing arbitrator's decision whether there had been a "layoff" or a "discharge"); *Barnhart* v. *Compugraphic*, No. 88-8441, 1989 U.S. Dist. LEXIS 13521, at *5 (E.D. Pa. Nov. 1, 1989), *aff'd*, 908 F.2d 961 (3d Cir. 1990) (deciding whether there had been a "layoff" or "termination").

The ERISA cases are numerous and consistent, whether construing a "layoff" provision of a pension plan or a severance pay plan.[14] In case after case, the courts have endorsed the common sense construction that a plan participant has not been laid off unless he suffers a period of real unemployment in which he is not receiving an income. *See, e.g., Rowe* v. *Allied Chemical Hourly Employees' Pension Plan*, 915 F.2d 266 (6th Cir. 1990) (pension plan; de novo review); *Pabst Brewing Co.* v. *Anger*, 784 F.2d 338 (8th Cir. 1986) (severance plan); *Jung* v. *FMC Corp.*, 755 F.2d 708, 713 (9th Cir. 1985) (severance plan); *Garavuso* v. *Shoe Corp. of America*, 709 F. Supp. 1423, 1428 (S.D. Ohio) (severance plan), *aff'd*, 892 F.2d 79 (6th Cir. 1989); *Amore* v. *General Elec. Co.*, No. 85-4575-Z (D. Mass. Nov. 14, 1986) ("layoff benefit" plan); *Esler* v. *Northrop Corp.*, No. 20537-B (W.D. Mo. Aug. 4, 1981) (pension and severance plan). Petitioners, of course, have cited no ERISA cases to the contrary.

Under the circumstances, petitioners have no basis for suggesting that there is a conflict among the circuits. Moreover, petitioners do not have a respectable argument to make on the merits regarding the language of the Plan in this case. Under *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989), the courts must determine "the intention of the settlor" in construing the terms of a plan.

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[14] Pension and severance cases are equally relevant because the purpose of providing or enhancing benefits in the event of a real layoff (i.e. actual loss of work) is the same: "to aid employees through a period of unemployment due to layoff, *during which the employee is without income.*" *Garavuso* v. *Shoe Corp. of America*, 709 F. Supp. 1423, 1428 (S.D. Ohio) (emphasis added), *aff'd*, 892 F.2d 79 (6th Cir. 1989). *See, e.g., Jung* v. *FMC Corp.*, 755 F.2d 708, 713 (9th Cir. 1985).

Id. at 112 (quoting Restatement (Second) of Trusts § 4 comment *d* (1959)). Throughout this litigation, petitioners have never offered any evidence that GATX, as Plan sponsor, intended to deplete Plan assets by enhancing benefit payments for employees who had suffered no interruption of income.

The terms of the relevant provision explain petitioners' failure. Section 4.5 of the Plan grants enhanced benefits only to those participants who suffer "a Termination of Employment due to permanent shutdown of a plant, department or subdivision thereof, or due to layoff or disability." Participants who suffer a termination of employment "due to" a plant shutdown, layoff or disability share three features: they no longer occupy their jobs; they have lost their full salary; and they are in need of a supplement for lost income. Under ordinary canons of construction, "doubt as to the meaning of a specific term in an enumeration should be resolved by reference to the other specific terms in the group or class." *Royal Ins. Co. (U.K.) Ltd.* v. *Ideal Mutual Ins. Co.*, 649 F. Supp. 130, 135 (E.D. Pa.), *aff'd mem.*, 806 F.2d 254 (3d Cir. 1986).

Petitioners have thus failed to account for the consistent ERISA caselaw supporting the Plan's decision or to explain how their desired construction of "layoff" can credibly be said to express the intent of GATX as settlor. They have again failed to offer a credible reason for certiorari, let alone reversal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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